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In The
Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-947

ATLANTIC MARINE, INC.,

Petitioner,

-vs-

JIG III CORPORATION, PURITAN MARINE INSURANCE CORP., MID-AMERICAS GENERAL & REINSURANCE COMPANY, JAMES I. GEORGE, JR., and JAMES I. GEORGE, III,

Respondents.

PETITIONER'S REPLY BRIEF
(Including Suggestion to Certify to Florida Supreme Court)

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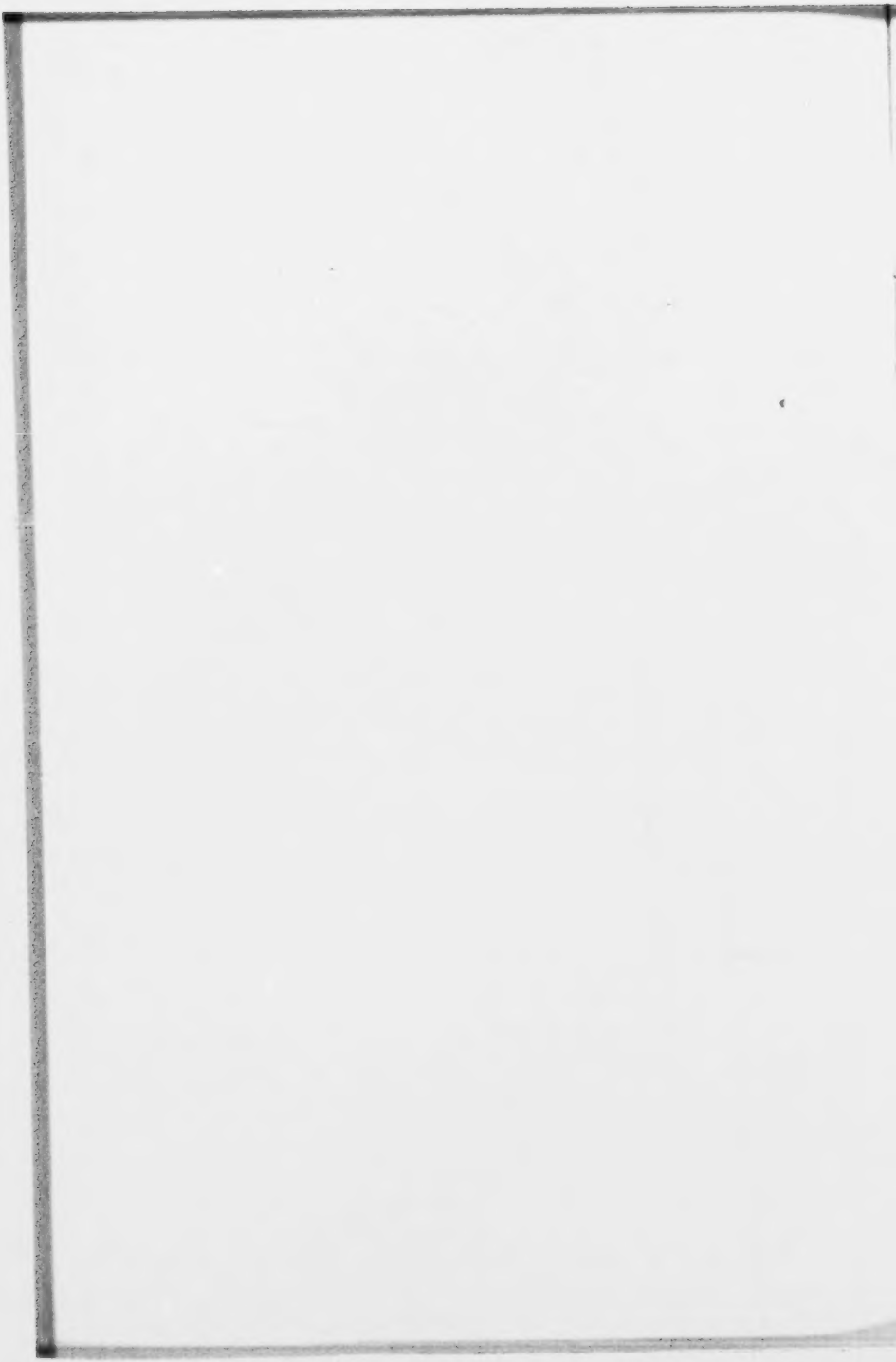

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The Respondents' Brief prompts this Reply, since Respondents avoid the thrust of the Petition for Writ of Certiorari and attempt to set out alleged inaccuracies in the Petition.

A. *The parties were of equal bargaining power.*

Respondents' claim (Respondents' Brief, pages 1-2) that Petitioner is in error by stating that the Court of Appeals held that the parties were of equal bargaining power. If there are any inaccuracies or misleading statements, they are on the Respondents' part. The two-man majority in the Fifth Circuit in fact prefaced its discussion of the issues in the

case by stating, "[W]here, as here, . . . the parties are of relatively equal bargaining power . . ." (519 F.2d 174, A.3) and refers to that proposition throughout the opinion (519 F.2d 175, 176, 177, A.4,6,7).

B. *The fact that Respondents' may have lost some other items not sold by Petitioner is immaterial.*

The vessel, the PRINCESS KE-AH-SOM-PAH, was sold to Respondents. If there were some equipment which was part of the vessel and lost at the time of the sinking, which was not sold by Petitioner, it makes little difference to the legal principle involved here, since Respondents can make a separate claim for that equipment, subject to proof on that issue.

Petitioner argues in its Petition that tort law does not apply to a claim for damages to or loss of the product itself, where there is privity and no personal injury. That principle cannot be eliminated by the buyer who merely may place some of his own equipment on board a vessel which is the manufactured product.

C. *The law of torts has no application in this case.*

The dissent (which is omitted from Respondents' Appendix to their Brief) correctely stated that the law of torts has no application in this case. At 519 F.2d 179 and 180 (A.10), Judge Gee remarked:

> "In short, taken together, the commercial law of Florida and the contract adequately defined *all* promises expressed and implied, and disclaimers of promises which these two economically-comparable parties made one another respecting the PRINCESS, its *quality* as well as its specifications and, of course, its price. If promises

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> are made and broken, the code, modified by the contract, provides adequate remedy. *There is no occasion for resort to the law of torts for a right or a remedy.*" (Emphasis supplied to last sentence.)

Judge Gee, in his dissent, eloquently pointed out that it is basically unfair to allow the purchaser/owner to prosecute a tort cause of action and be allowed to ignore the contract and bargain which it made and upon which the manufacturer/seller relied.

The majority, while stating that the admiralty courts have found a tort cause of action to exist in a situation such as that presented by this case, candidly states at 519 F.2d 177 (A.7):

> "We have been unable to discover any prior case involving a maritime tort claim based upon the negligent design and construction of a chattel where the buyer and seller thereof enjoyed relatively equal bargaining power and where the only damage was to the purchased article itself."

There is such a case, however, and it supports Petitioner's position entirely. In *Berg v. General Motors Corporation,* 534 P.2d 838 (Wash., 1975), a commercial fisherman sought to recover lost profits and other consequential damages arising from the failure of two fishing boat engines which were manufactured by the defendant. Plaintiff brought suit for negligent manufacture, and the Washington court affirmed the trial court in dismissing the suit to recover purely economic loss insofar as it was founded in negligence theory, citing "substantial authority" at 534 P.2d 840 for rejecting such claims.

Respondent attempts to avoid the issue raised in the Petition by relying primarily on the *negligence* finding by the jury, dismissing the authority which shows overwhelmingly that loss of the product itself is not recoverable under the doctrine of strict liability in tort. Such a distinction has no merit. As the court states in *Berg v. General Motors Corporation*, supra, at 534 P.2d 841, footnote 1:

> "[I]t is apparent that the rule barring tort recovery for economic loss is the same under either strict liability or negligence theory."

Respondents state that the Court of Appeals was correct in holding that the loss of the product itself can be recoverable under a cause of action for tort negligence. That holding is simply contrary to existing law and the law as it is developing under the Uniform Commercial Code. One case which is directly in point is *Long v. Jim Letts Oldsmobile, Inc.*, 217 S.E.2d 602 (Ga., 1975). In that case plaintiff sought to recover *in tort* against the manufacturer and seller of a *new* automobile *for damages to the vehicle itself* arising from defects in the engine. The court squarely held, as should have been the case here, that plaintiff's only remedy for the damages suffered is in contract. At 217 S.E.2d 604 the court states:

> "In the present case, the duty of the manufacturer was to produce a car that would not overheat. The duty of the seller-repairman was to fix the car so that it would not overheat. These duties arose, in both cases, solely from the contract between the plaintiff, Long, and these two defendants. The breach of that duty (which is the only duty alleged to have been breached) amounts only to a breach of the contractual duties of the defendants. There may have been other

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> duties owed by the defendants to Long, which arose independent of the contracts, such as the duty imposed on suppliers and repairmen of chattels to use reasonable care not to place in the hands of the consumer a 'product which may reasonably be expected to be capable of inflicting substantial harm if it is defective.' Prosser, Law of Torts, 4th Ed. (1971), p. 643. MacPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050. See Griffith v. Chevrolet Motor Division, 105 Ga. App. 588 (1), 125 S.E.2d 525. However, Long's complaint does not assert that such a duty has been breached by the defendants nor has he submitted any evidence that he has suffered 'substantial harm' within the meaning of the products liability rule. *The 'harm' contemplated or the interest protected against by such rule is 'bodily harm,' injury to 'life and limb,' injury to others and damage to property other than the product itself.*" (Emphasis supplied.)

The rule could not be stated more clearly! The "harm" in the present case is identical to that in *Long v. Jim Letts Oldsmobile, Inc.,* supra. It is not the type of "harm" within the meaning of the products liability rule. The Georgia court further states at 217 S.E.2d 605:

> "Here, Long's only damages claimed are economic; diminution in value, and while we sympathize with Long for the aggravation and inconvenience he has suffered because of the defects in the car, such inflictions are not compensable elements of damage in this case, and *his only remedy for the pecuniary damages suffered is in contract.*" (Emphasis supplied.)

On this issue the decision of the Fifth Circuit Court of Appeals is in direct conflict with holdings of the courts of

Georgia [*Long v. Jim Letts Oldsmobile, Inc.*, supra], Nebraska [*Hawkins Construction Co. v. Matthews*, 209 N.W. 2d 643 (Neb., 1973)], California [*Seely v. White Motor Co.*, 403 P.2d 145 (Cal., 1965)], Texas [*Pioneer Hi-Bred International, Inc. v. Talley*, 493 S.W.2d 602 (Tex. Civ. App. - Amarillo, 1973), and *Thermal Supply of Texas, Inc. v. Asel*, 468 S.W.2d 927 (Tex. Civ. App. - Austin, 1971)], New Hampshire [*Hagenbuch v. Snap-On Tools Corporation*, 339 F.Supp. 676 (D.N.H., 1972), Arizona, Hawaii and Alaska [*State of Arizona v. Cook Paint and Varnish Co.*, 391 F.Supp. 962 (D. Ariz., 1975), also referring to the law of California and Texas]. In Judge Gee's words, the majority's holding "which gives tort law pre-eminence, mangles the intricate mechanism of the U.C.C.," because the responsibility for the loss, where the loss is of the value of the product itself, should be allocated to the law of sales. As Petitioner said in its Petition (at page 12):

> "Who will untangle the damage now done, not only to Atlantic Marine but to the Uniform Commercial Code, if not this Court?"

Respondents suggest that the issues here "do not appear to involve 'principles the settlement of which is of importance to the public, as distinguished from that of the parties.'" How can that be the case when (1) the law has been well established that a contract to build a ship is not a maritime contract [*Kossick v. United Fruit Co.*, 365 U.S. 731 (1961)]; (2) the two-man majority deliberately applied general maritime law to a non-maritime contract in conflict with applicable Florida law as embodied in the U.C.C.; and (3) forty-nine of the fifty states have adopted the U.C.C.? Certainly, the issues here are of importance to the public and involve no less than uniform interpretation of the U.C.C.

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In the present case, the two-man majority chose to look to what it called "maritime tort" in order to erroneously conclude that the Uniform Commercial Code (A.17-22) has no application in the commercial setting which is the basis of this case and for which the Code was drafted. The two-man majority's reasoning is difficult to follow because it is without foundation, which the court almost conceded. At 519 F.2d 177 (A.8), Judge Goldberg for the majority stated that it would be anomalous to hold that Jig III's (purchaser/owner) case should be governed by maritime principles, and Atlantic Marine's (manufacturer/seller) defense should be grounded in contract and Florida law. He added:

> "On the other hand, since the contract was made and the PRINCESS built in Florida, it is certainly plausible to assume not only that Florida has a considerable interest in the resolution of this case, but also that the parties themselves expected that their contractual relations would be governed by Florida law."

D. *The law of Florida, not Maritime Law, applies.*

The Court of Appeals applied general maritime tort law. Respondents argue in Point I of their Brief (pages 6 and 7) that the court was correct in applying general maritime tort law. In his dissent, Judge Gee states [519 F.2d 180 (A.10, 11)], "The majority, rather than looking to the commercial law of the State of Florida, has chosen to look to general maritime, tort law." The Court of Appeals was wrong in applying admiralty law, but even if it were correct in applying the law of admiralty, it did so improperly.

1. *If this were an admiralty case, there would have been no jury trial.*

A jury decided the issues in this case. Yet, the Court of Appeals concludes that general maritime tort law is applicable. If this were an admiralty case, then Atlantic Marine, Petitioner herein, had a right to a non-jury trial.

As the court said in *Alaska Barite Company v. Freighters, Inc.*, 54 F.R.D. 192 (N.D., Calif., 1972), at page 194:

> "Rule 9(h) was added to the Federal Rules as part of the unification of the admiralty and civil practices in 1966. The Advisory Committee Note of 1966 to Subdivision (h) stated that '[i]t is no part of the purpose of unification to inject a right to jury trial in those admiralty cases in which that right is not provided by statute.' Rule 9(h) ties into Rule 38(e) where the admiralty practice of trials before the court without a jury is preserved."

In Volume 2B, Federal Practice and Procedure, Barron & Holtzoff, page 12, Section 872 of the pocket part, the author says:

> "There is no right to jury trial, except as expressly provided by Congress, in actions on the admiralty side of the federal court."

If the Fifth Circuit is now to be allowed to say that the claim involved herein is an admiralty tort, then at the very least the case should be remanded for retrial without a jury. The mischief in applying admiralty law becomes readily apparent.

2. *For Admiralty Law to apply to the present case, the admiralty court must look to the law of Florida.*

On the claim based on ***strict liability***, the jury found that

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the sinking of the PRINCESS resulted from a defect in the design or construction of the boat. On the claim of *negligent design and construction,* the jury also found that Atlantic Marine was negligent in the "design and/or manufacture of the vessel." (519 F.2d 173, A.2,3). The two-man majority stated at 519 F.2d 175 (A.5) as follows:

> "The admiralty courts have followed the general rule that a tort cause of action exists in a situation such as that presented by this case."

Of the cases cited in support of the majority's position, *Houston-New Orleans, Inc. v. Page Engineering Co.*, 353 F.Supp. 890 (E.B., La., 1972); *Sears Roebuck & Co. v. American President Lines, Ltd.*, 345 F.Supp. 395 (N.D., Calif., 1971); *Taisko Fire and Marine v. Vessel MONTANA*, 335 F.Supp. 1238 (N.D., Calif., 1971); *Dudley v. Bayou Fabricators, Inc.*, 330 F.Supp. 788 (S.D., Ala., 1971); and *In re Alamo Chemical Transportation Co.*, 320 F.Supp. 631 (S.D., Tex., 1970), specifically rely on the case of *Schaeffer v. Michigan-Ohio Navigation Co.*, 416 F.2d 217 (6th Cir., 1969), which is also cited by the majority. The common principle which is stated in *Schaeffer v. Michigan-Ohio Navigation Co.*, supra, is that

> "[A]dmiralty law (albeit slowly) draws upon and incorporates the law prevailing on land where there is no historic (or statutory) principle to the contrary."

The only other case cited, *Alcoa SS Co. v. Charles Ferran & Co.*, 383 F.2d 46 (5th Cir., 1967), relies upon the case of *Wilburn Boat Company v. Fireman's Fund Insurance Company*, 348 U.S. 310 (1955), which established the principle whereby the admiralty court must look to the state law where there is no rule of federal origin or application on a subject.

Since admiralty law draws upon and incorporates "the law prevailing on land where there is no historic (or statutory) principle to the contrary," what is "the law prevailing on land"? It must be Florida law. Even the majority below recognizes that the only contact with "land" was with Florida, the state in which the shipbuilding contract was made and performed (519 F.2d 177, A.8).

The only Florida law dealing with the subject matter of this case is in the area of strict liability, one of the tort grounds upon which liability is predicated in the instant case. Respondents argue that "under strict liability in tort Respondents would be entitled to recover against Petitioner" (Respondent's Brief, page 12). It is clear, however, that in Florida the doctrine of strict liability does not apply under any circumstances. *Lipsius v. Bristol-Meyers Co.*, 265 So.2d 396 (Fla., 1st D.C.A., 1972).

On the question of negligence, Petitioner points out in its Brief (page 8):

> "The Florida courts have not considered a case involving a claim based upon the negligent design and construction of a chattel where the buyer and seller thereof enjoyed relatively equal bargaining power and where the only damage was to the purchased article itself."

If, then, it is proper, which Petitioner denies, to apply the admiralty law to the present case, and this Court is in doubt as to the course the Florida court would take, how can the Florida law concerning negligence as "the law prevailing on land" be determined?

3. *The question should be certified to the Supreme Court of Florida.*

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Florida law provides a procedure for certification to the Supreme Court of Florida to answer a question such as this. Section 25.031, Florida Statutes, provides as follows:

> "The supreme court of this state may, by rule of court, provide that, when it shall appear to the supreme court of the United States, to any circuit court of appeals of the United States, or to the court of appeals of the District of Columbia, that there are involved in any proceeding before it questions or propositions of the laws of this state, which are determinative of the said cause, and there are no clear controlling precedents in the decisions of the supreme court of this state, such federal appellate court may certify such questions or propositions of the laws of this state to the supreme court of this state for instructions concerning such questions or propositions of state law, which certificate the supreme court of this state, by written opinion, may answer."

In accordance with the statute, the Supreme Court of Florida has set forth the procedure in Rule 4.61, Florida Rules of Civil Procedure, which reads in pertinent part as follows:

> "a. *When Certified.* When it shall appear to the Supreme Court of the United States or to any of the Courts of Appeal of the United States that there are involved in any proceeding before it questions or propositions of law of this state which are determinative of said cause and that there are no clear controlling precedents in the decisions of the Supreme Court of this state, such federal appellate court may certify such questions or propositions of law of this state to the Supreme Court of Florida for instructions concerning such questions or propositions of state law.

. . .

> "c. *Method of Invoking Rule.* The provisions of this Rule may be invoked by any of the federal courts referred to in subparagraph a hereof upon its own motion or upon the *suggestion* or motion of any interested party when approved by such federal court." (Emphasis supplied).

That procedure for determining Florida law on a subject was invoked recently by this Court in the case of *Lehman Brothers v. Schein*, 416 U.S. 386 (1974). This Court has used that path before, as have courts of appeals. See footnotes 5 and 6 at 416 U.S. 390.

Petitioner suggests that this Court certify the question to the Florida Supreme Court (as specified at the conclusion of this brief.)

But this is only if the Court is in doubt as to Florida law under the U.C.C. Petitioner still maintains, as emphasized by Judge Gee, that the Uniform Commercial Code precludes an action for negligence where the only damage is to the purchased article itself.

The Question Presented in the Petition for Writ of Certiorari, in spite of Respondents' attempt to confuse the issue, still remains:

> "Has the Fifth Circuit two-man majority erroneously applied general maritime *tort* law to a non-maritime *contract* in conflict with applicable Florida law?"

Judge Gee, in his dissent, shows the vital importance of the question when he states at 519 F.2d 180 and 181 (A.10-12):

> "The majority, rather than looking to the commercial

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law of the State of Florida, has chosen to look to general maritime, tort law. . . .

"Where there is privity, no personal injury, and property damage only to the defective product itself, any remedies which a purchaser might have against his seller/manufacturer should be given by the laws of sales or the particular terms of the contract between the parties, not by the law of torts. The majority's contrary rule, which gives tort law preeminence, mangles the intricate mechanism of the U.C.C. and rewrites past contracts of maritime manufacturers such as Atlantic Marine entirely, changing the negotiated terms concerning the quality of the goods to be delivered. Quality, of course, directly affects price. Both quality and price should be negotiable items, and the law of sales is the framework within which the negotiations should take place--and did take place here. *For these reasons I would hold that the general maritime law should not and does not recognize a tort-based, product-liability cause of action based either on negligence or strict manufacturer liability when there is privity and when the only loss suffered results from damage to the defective product itself.* In holding that it does, we simply withdraw from the parties, and after the fact, a portion of the freedom to contract which the codifiers meant them to keep." (Emphasis supplied.)

The two-man majority takes the position that the admiralty courts have found a tort cause of action to exist in a situation such as that presented by this case. Judge Gee in footnote 9 at 519 F.2d 180 and 181 (A.11,12) distinguishes those cases,

none of which involves Florida law. But in any event, if the admiralty law can draw upon and incorporate "the law prevailing on land," it must look to the Florida law, the only "land" law which is applicable to the present case. There is no Florida case in which the courts of that state have considered a case involving a claim based upon the negligent design and construction of a chattel where the buyer and seller thereof enjoyed relatively equal bargaining power and where the only damage was to the purchased article itself. The Florida courts have said that the doctrine of strict liability does not apply in Florida, [*Lipsius v. Bristol-Myers Co.*, supra] and it is reasonable to assume that the Florida Supreme Court would follow the rule as set forth by the dissenting member of the Court of Appeals and the courts of Georgia, Nebraska, California, Texas, New Hampshire, Arizona, Hawaii and Alaska. As Mr. Justice Douglas said in *Lehman Brothers v. Schein*, at 416 U.S. page 389, even though the Court of Appeals thought it was "viewing the case as the Florida court would probably view it," justifiably so, "a state can make just the opposite her law." He also notes in footnote 6 at 416 U.S. p. 390 in cases involving the Fifth Circuit Court of Appeals, that

> "The Fifth Circuit's willingness to certify is in part a product of frequent state court repudiation of its interpretations of state law."

There can be no finer disservice to the law than to have the Fifth Circuit, as it has done in this case, incorporate the law prevailing on land, and later to have the "land" law found to be "just the opposite" by the "land" involved, i.e., the State of Florida. It is for that reason that Petitioner suggests that if this Court is in doubt as to Florida law under the U.C.C. that the Court certify to the Supreme Court of

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Florida the following question:

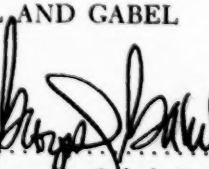
> "Under Florida law, is there a cause of action based upon the negligent design and manufacture of a chattel where the buyer and seller thereof enjoyed relatively equal bargaining power and where the only damage is to the purchased article itself?"

CONCLUSION

There is no tort-based product-liability cause of action based either on negligence or strict manufacturer liability when there is privity, no personal injury, and the only loss suffered is damage to the defective product itself. The Court of Appeals erred in so holding in its two to one decision. As the dissenter flatly stated, "the opinion of the majority confounds the law of torts and contracts and imparts this tangle into the general maritime law," and Petitioner calls upon this Court to grant certiorari to review the decision of the Court of Appeals which applies general maritime law to a non-maritime contract, contrary and in conflict with applicable Florida law. This is a question of vital import to the forty-nine states which have adopted the U.C.C.

Respectfully submitted,

WAHL AND GABEL

By 

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Reply Brief was furnished to the following counsel:

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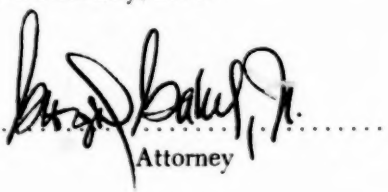

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